No. 18-481

In the Supreme Court of the United States

FOOD MARKETING INSTITUTE, *Petitioner*

v.

ARGUS LEADER MEDIA, D/B/A ARGUS LEADER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NFIB SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. NFIB represents small businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Small Business Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

Amici's members frequently submit sensitive information to the federal government, either voluntarily; as a condition of obtaining a discretionary government benefit; or under mandatory reporting requirements. Whether such information is subject to public disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is therefore of great importance to *amici* and their members. Accordingly, they have a keen interest in the proper interpretation of FOIA's Exemption 4, which protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." *Id.* § 552(b)(4). As petitioner has explained, the lower courts have adopted an atextual interpretation of Exemption 4, and, in doing so, have created substantial uncertainty regarding the exemption's scope. That uncertainty impedes the ability of businesses to make informed judgments regarding the potential risks of sharing with the government sensitive materials regarding their operations.

INTRODUCTION AND SUMMARY OF ARGUMENT

To function, the government requires information from the governed. Much of that information is "confidential"—*i.e.*, it is held "in confidence" and is "not publicly disseminated." *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 931 F.2d 939, 947 (D.C. Cir. 1991) (*Critical Mass II*) (Randolph, J., concurring) (quoting *Webster's Third International Dictionary* 476 (1981)). FOIA's Exemption 4 protects such information from public release by the government. It provides that FOIA's command to "make [agency] records promptly available to any person" upon request "does not apply to matters that are * * * commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(a)(3)(A), (b)(4). In keeping with the ordinary meaning of its plain language, this provision should allow businesses to share sensitive commercial information freely with the government, safe in the understanding that the information will not be disclosed under FOIA as long as the submitter has not otherwise made the information available to the general public.

As petitioner explains, however, the courts of appeals have turned away from Exemption 4's plain text. Instead, they have held that the party invoking Exemption 4 bears the burden of proving that disclosure "is likely * * * to impair the Government's ability to obtain necessary information in the future" or "to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

That test has no basis in Exemption 4's text, which nowhere refers to the concepts of substantial competitive harm or the government's ability to obtain necessary information. Refocusing lower courts on Exemption 4's plain text is particularly important because the *National Parks* standard has proven to be extraordinarily burdensome and unworkable. Because the rule is not guided by FOIA's text, the courts of appeals have diverged in their interpretation and application of *National Parks*, creating substantial uncertainty regarding Exemption 4's scope. Adding to the uncertainty, *National Parks* requires courts to make disclosure decisions based on forecasts of competitive conditions, which are dynamic and thus subject to rapid, unforeseen changes. For example, the lower courts' decisions here were based on an analysis of competition among brick-and-mortar grocery stores. That analysis does not account for the Department of Agriculture's recent decision to allow online retailers to participate in the Supplemental Nutrition Assistance Program ("SNAP"). That decision fundamentally alters the competitive calculus: It is easier and less costly for online retailers to use store-level SNAP data to target customers because those retailers do not need to undertake the considerable expense of opening physical stores.

The uncertainty created by *National Parks* severely impairs companies' ability to plan their affairs and make informed decisions about whether to voluntarily share sensitive information with the government or participate in programs that mandate disclosure of confidential information to government agencies. If a company does share its information and that information is then the subject of a FOIA request,

the company may be required to expend significant resources to establish that the information's public disclosure would cause substantial competitive harm. By contrast, adhering to Exemption 4's plain language would provide greater predictability and simplify litigation for both parties and courts by focusing the inquiry on the straightforward question of whether the information at issue is "confidential" or instead has been publicly disseminated. Courts should ordinarily be able to answer that question without extensive evidentiary proceedings or expert testimony.

Exemption 4 affects industries as diverse as nuclear waste disposal,[2] banking,[3] real estate development,[4] manufacturing,[5] agriculture,[6] and the importation of certain animals.[7] And the kinds of information that may be at issue in Exemption 4 cases are equally diverse, including among other things: audit reports documenting a corporation's financial position,[8] records of quality inspections at food

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[2] *State of Utah* v. *Dep't of Interior*, 256 F.3d 967, 970 (10th Cir. 2001).

[3] *Inner City Press/Cmty. on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 242 (2d Cir. 2006).

[4] *Nadler* v. *FDIC*, 92 F.3d 93, 94-95 (2d Cir. 1996).

[5] *United Techs. Corp. ex rel. Pratt & Whitney* v. *FAA*, 102 F.3d 688, 689 (2d Cir. 1996).

[6] *Lion Raisins, Inc.* v. *USDA*, 354 F.3d 1072, 1076 (9th Cir. 2004), overruled on other grounds by *Animal Legal Def. Fund* v. *USDA*, 836 F.3d 987 (9th Cir. 2016).

[7] *People for the Ethical Treatment of Animals* v. *Dep't of Health & Human Servs.*, 901 F.3d 343, 347-348 (D.C. Cir. 2018) ("*PETA*").

[8] *Sharyland Water Supply Corp.* v. *Block*, 755 F.2d 397, 400 (5th Cir. 1985).

processing facilities,[9] airplane-engine designs,[10] and "detailed intrastate sales information, including the names of purchasers * * * and price terms."[11] The sheer number of businesses affected by *National Parks*, as well as the amount of litigation generated by its application, underscores the significance of this case for the national economy and the importance of interpreting Exemption 4 in accordance with the plain meaning of the text that Congress enacted.

ARGUMENT

I. The Atextual *National Parks* Standard Has Proven Unworkable

Unmoored from FOIA's text, the *National Parks* standard has proven to be unworkable. The courts of appeals routinely diverge on its proper interpretation and application. Much of the disagreement pertains to the showing required to establish that disclosure would cause substantial competitive harm. See Pet. 25-29. Courts of appeals disagree regarding (1) the level of precision with which the party resisting disclosure must establish a particular competitive harm, such as lost market share,[12] (2) the role that

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[9] *Lion Raisins*, 354 F.3d at 1075-1078.

[10] *Pratt & Whitney*, 102 F.3d at 689-690.

[11] *Continental Oil Co.* v. *Fed. Power Comm'n*, 519 F.2d 31, 32 (5th Cir. 1975).

[12] See *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 136 S. Ct. 383, 384 (2015) (Thomas, J., dissenting). Compare, *e.g.*, *Utah*, 256 F.3d at 970 (accepting "*potential* economic harm" as sufficient to establish substantial competitive harm), with Pet. App. 5a ("A likelihood of commercial usefulness—without more—is not the same as a likelihood of substantial competitive harm."), and *GC MicroCorp.* v. *Def. Logistics Agency*, 33 F.3d 1109, 1114-1115 (9th Cir. 1994) (compelling disclosure despite affidavits from

defining a "relevant market" plays in determining the existence of "competition,"[13] (3) whether competitive harm can be shown based on the possibility of future competition from new market entrants,[14] and (4) whether embarrassment and bad publicity can qualify as cognizable "competitive injur[ies]."[15]

The courts of appeals also disagree over issues unrelated to the existence or non-existence of a substantial competitive harm. For example, *National Parks*' first prong—under which information qualifies as "confidential" if disclosure would likely "impair the

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affected businesses explaining that competitors could use information to "alter their subcontracting strategies to better compete"), overruled on other grounds by *Animal Legal Def. Fund* v. *USDA*, 836 F.3d 987 (9th Cir. 2016).

[13] See *N.H. Right to Life*, 136 S. Ct. at 384 (Thomas, J., dissenting). Compare, *e.g.*, *Watkins* v. *Bureau of Customs & Border Prot.*, 643 F.3d 1189, 1196 (9th Cir. 2011) ("[T]he government needs to show there is actual competition in the *relevant market* and a likelihood of substantial injury." (emphasis added)), with *N.H. Right to Life* v. *Dep't of Health & Human Servs.*, 778 F.3d 43, 51 (1st Cir. 2015) (declining to "myopic[ally] focus[]" on any one relevant market and instead looking to see whether the information submitter faced actual competition in *any* market).

[14] Compare, *e.g.*, *N.H. Right to Life*, 778 F.3d at 51 (emphasizing that a "potential future competitor could take advantage" of information at issue), with *Hercules, Inc.* v. *Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988) (holding that argument regarding future competition was impermissibly "speculative").

[15] See *N.H. Right to Life*, 136 S. Ct. at 384-385. Compare, *e.g.*, *Nadler*, 92 F.3d at 97 (finding a likelihood of substantial competitive harm when requesters sought information to support their opposition of real estate development project), with *Pub. Citizen Health Research Grp.* v. *FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) ("emphasiz[ing] that" competitive harm "should not be taken to mean simply any injury to competitive position, as might flow from * * * embarrassing publicity" (citation omitted)).

Government's ability to obtain necessary information in the future," 498 F.2d at 770—has also generated disagreement among the courts of appeals. Some courts have adopted a "program effectiveness" test, which allows the government to withhold information when doing so "serves a valuable purpose and is useful for the effective execution of [an agency's] statutory responsibilities." *9 to 5 Org. for Women Office Workers* v. *Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 11 (1st Cir. 1983); see also *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 830 F.2d 278, 286-287 (D.C. Cir. 1987) (*Critical Mass I*). But others have rejected that test, concluding it "would give impermissible deference to the agency, and would be analogous to the 'public interest' standard rejected by the Supreme Court in the context of Exemption Five." *Bloomberg, L.P.* v. *Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 150-151 (2d Cir. 2010) (citing *Fed. Open Market Comm'n of Fed. Reserve Sys.* v. *Merrill*, 443 U.S. 340, 354 (1979)).

Most striking of all, the courts of appeals have failed to even decide definitively when *National Parks* applies. Almost two decades after handing down the decision, the D.C. Circuit was still grappling with its consequences in 1992. See *Critical Mass Energy Project* v. *Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc) (*Critical Mass III*). After granting rehearing *en banc* to reconsider *National Parks*, the D.C. Circuit declined to overrule that decision, but instead imposed an atextual limitation on its atextual test, "confin[ing] [the *National Parks* standard] to information that persons are *required* to provide to the Government," explaining that voluntarily submitted information should be "treated

as confidential under Exemption 4 if it is of a kind that the provider would not customarily make available to the public." *Id.* at 872 (emphasis added).

To date, only the Tenth Circuit has embraced the D.C. Circuit's distinction between voluntary and involuntary submissions. See *Utah*, 256 F.3d at 969. Other circuits have sidestepped the question, depriving the government and private litigants of guidance on whether their disputes will be subjected to the *National Parks* test. See, *e.g.*, *N.H. Right to Life*, 778 F.3d at 52 n.8; see also *Inner City Press/Cmty. on the Move* v. *Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 245 n.6 (2d Cir. 2006); *Am. Mgmt. Servs., LLC* v. *Dep't of the Army*, 703 F.3d 724, 731 n.6 (4th Cir. 2013); *Frazee* v. *Forest Serv.*, 97 F.3d 367, 371-372 (9th Cir. 1996).

These splits are powerful evidence that the *National Parks* standard is unworkable and that this Court should refocus lower courts' attention on Exemption 4's plain text. The Department of Justice's *Guide to the Freedom of Information Act* offers a particularly stark illustration of just how much courts have struggled in attempting to apply *National Parks*. See Department of Justice, *Guide to the Freedom of Information Act*, http://bit.ly/2BhLA9Q ("*Guide*"). Although the *Guide* addresses some exemptions in fewer than ten pages, it spends 94 pages and 552 footnotes describing the fractured case law addressing Exemption 4. *Guide*, "Exemption 4," at 263-356. The *Guide*'s discussion of the meaning of the word "confidential" under *National Parks* comprises the bulk of that material, with 79 pages and 478 footnotes devoted to the subject. *Id.* at 273-352. This extensive treatment was necessary to address the multitude of

divergent outcomes yielded by the vague, extratextual and fact-intensive *National Parks* test.

An interpretation consistent with the statute's ordinary meaning would promote greater clarity, as evidenced by the *Guide*'s discussion of the word "confidential" under Exemption 7(D). There, "confidential" is discussed in a comparatively crisp 23 pages and 80 footnotes. *Guide*, "Exemption 7(D)," at 6-21, 27-33. That relative concision is possible because of this Court's holding in *Department of Justice* v. *Landano*, 508 U.S. 165 (1993), that the word "confidential" should be given its ordinary meaning. *Id.* at 173-174. A similar holding in the context of Exemption 4 would promote administrability and clarity in the law. The greater predictability that would result from a text-based approach would be highly "valuable to corporations making business and investment decisions." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94-95 (2010) (citing *First Nat. City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983)).

II. *National Parks* Is Extraordinarily Burdensome

The *National Parks* test has also imposed substantial burdens on courts and litigants. The government and the private party resisting disclosure must devote significant time and resources to amass the evidence—often including costly and time-consuming expert testimony—that is required to bear their burden of establishing that disclosure would cause substantial competitive harm. See 5 U.S.C. § 552(a)(4)(B); *National Parks & Conservation Ass'n* v. *Kleppe*, 547 F.2d 673, 679 n.20 (D.C. Cir. 1976). This

evidentiary burden is taxing even for the government, whose resources are vast.[16] The burden on private parties, particularly small businesses, is significantly greater.[17] In fact, it is likely that the evidentiary burden of *National Parks* deters many small businesses and other private parties from even pursuing meritorious litigation to shield their sensitive information.

When litigation ensues, trial courts are burdened as well. They must devote time to resolving factual disputes—which may necessitate lengthy evidentiary hearings—even though other kinds of "FOIA cases are typically and appropriately decided on motions for summary judgment." *Harrison* v. *Exec. Office for U.S. Attorneys*, 377 F. Supp. 2d 141, 145 (D.D.C. 2005); see also *Miscavige* v. *IRS*, 2 F.3d 366, 369 (11th Cir. 1993) ("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified."); *World Pub. Co.* v. *Dep't of Justice*, 672 F.3d 825, 832 (10th Cir. 2012) (similar).

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[16] The Department of Agriculture's decision here to acquiesce in the district court's decision rather than pursue an appeal illustrates how the *National Parks* test risks deterring government agencies from vigorously resisting the release of confidential commercial information. See Pet. 7. By substantially increasing the burdens of FOIA litigation, *National Parks* creates the risk that agencies will determine that Exemption 4 litigation is too costly or difficult to be worth pursuing.

[17] See, *e.g.*, *Sharyland*, 755 F.2d at 398-399 (in which a nonprofit "rural water supply corporation," owned by its 5,200 customers, was required to furnish "specific factual or evidentiary material" demonstrating that by disclosing audit reports and financial statements the government would cause it "irreparable [competitive] harm in its relations with contractors, materialmen, suppliers, employees, and landowners").

And the burdens continue on appeal, because the appellate court often must wade through a lengthy record to review the trial court's findings.[18]

Take this case. The district court held a two-day bench trial to assess the competitive harm of releasing store-level SNAP sales data. See Pet. 6. At trial, the Department of Agriculture presented testimony from the president and owner of a supermarket chain, the president and CEO of the National Grocers Association, a senior vice president of marketing of a convenience-store chain, an associate general counsel of Sears Holdings Management Corporation, and an expert witness on the food-retail industry. See Pet. App. 11a-15a. And their testimony concerned complex technical matters, including profit margins in the retail-food business, the potential effect of store-level SNAP sales data on commercial lease negotiations, and the use of model forecasts in developing grocery stores' expansion strategies. *Ibid.* Despite the government's substantial proof (which at a minimum

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[18] The Eighth Circuit sought to counter these considerations by asserting that applying Exemption 4 in accordance with its plain language "would swallow FOIA nearly whole." Pet. App. 4a n.4. But that assertion is unfounded. As Exemption 4's text makes clear, it applies only to "trade secrets" and "privileged or confidential" information that is "commercial or financial" in nature and that the government "obtained" from a third party. 5 U.S.C. § 552(b)(4). The Eighth Circuit provides no reason to believe that a substantial proportion of the mountains of data otherwise subject to disclosure under FOIA satisfy those criteria. And as petitioner notes, much of the information potentially subject to Exemption 4 is requested to further narrow commercial interests, rather than FOIA's objective of improving "public understanding of the operations or activities *of the government*." Pet. Br. 33-35 (quoting *U.S. Dep't of Def.* v. *Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994)).

demonstrated that the data at issue "might prove useful" to competitors), the courts below still concluded that the Department had failed to satisfy its burden to justify withholding the SNAP data under the *National Parks* test. *Id.* at 5a; see also *id.* at 18a-20a.

This kind of elaborate and expensive bench trial would not have been necessary if "confidential" had been given its ordinary meaning under Exemption 4. In fact, given a plain-meaning interpretation of Exemption 4, this case may well have been decided on summary judgment. Respondent does not seriously dispute that store-level SNAP sales data "would not customarily [be made] available to the public." *Critical Mass III*, 975 F.2d at 872; see also Br. in Opp. 7 (not contesting that "information about the amount of SNAP spending at individual retail food stores is not public knowledge"). And even if that point had been disputed, the issue likely could have been decided based on affidavits and other summary-judgment evidence.

National Parks itself is another case in point. That case involved a request for financial records that national park concessioners (businesses licensed to sell goods and services in national parks) were required to file with the National Park Service. See *National Parks*, 498 F.2d at 770. The district court found that the "information was of the kind that would not generally be made available for public perusal." *Ibid.* (citation omitted). Under the term's plain meaning, that should have sufficed for the information to qualify as "confidential" under Exemption 4. Yet the D.C. Circuit remanded the case for the district court to "determin[e] whether public disclosure of the information in question pose[d] the likelihood of

substantial harm to the competitive positions" of the concessioners. *Id.* at 771.

On remand, the district court held "two days of further evidentiary hearings * * * on the competitive injury issue." *National Parks*, 547 F.2d at 675. After considering this evidence, the court concluded that the bulk of the financial information at issue was protected from disclosure under the standard that the D.C. Circuit had announced. See *ibid.*

On the case's *second* appeal, the D.C. Circuit affirmed in part and reversed in part. *National Parks*, 547 F.2d at 687-688. Parsing the extensive factual record, the court concluded that the district court had clearly erred in "finding that disclosure of the financial information would 'materially increase the opportunity for potentially damaging competition for renewal of concessions [contracts].'" *Id.* at 682. Nevertheless, the D.C. Circuit held that the financial records of five of the seven concessioners involved in the case could be withheld under Exemption 4 because the record demonstrated that those concessioners "face[d] meaningful day-to-day competition with businesses offering similar goods and services both within and outside the national parks." *Id.* at 681. In reaching that conclusion, the court examined detailed evidence regarding "the location of the park concessioners relative to other similar businesses." *Id.* at 682. The court emphasized that one town near Yellowstone National Park "boast[ed] 47 motels, 9 gas stations and 12 restaurants" that competed with Yellowstone's major concessioner. *Id.* at 682-683. Similarly, the court noted that a concessioner in Grand Canyon National Park faced competition from businesses in "a small community" approximately

"eight miles" away that "feature[d] several hundred beds, 1,000 seats for food service and assorted curio shops." *Id.* at 683. Two concessioners failed to present similarly detailed evidence regarding their particular competitive situations. *Ibid.* For those concessioners, the D.C. Circuit ordered another remand for *still more* proceedings to determine whether the concessioners had satisfied the *National Parks* standard. *Id.* at 687-688.

National Parks thus imposes significant burdens on both litigants and courts, which can readily yield multiple trips between the court of appeals and the district court for an inquiry that "typically and appropriately" should be handled on summary judgment. *Harrison*, 377 F. Supp. 2d at 145. Adhering to Exemption 4's text would minimize the burdens for litigants and courts. Exemption 4's plain language sets forth a straightforward inquiry into whether the information at issue is "confidential"—*i.e.*, has been held "in confidence" and "not publicly disseminated." *Critical Mass II*, 931 F.2d at 947 (Randolph, J., concurring). Resolving that discrete issue generally should not require elaborate evidentiary proceedings or expert testimony, promoting important interests in administrative simplicity and conserving judicial resources. Cf. *Hertz Corp.*, 559 U.S. at 94-95.

III. *National Parks* Ignores The Speed With Which Competitive Conditions Can Change

National Parks' atextual "substantial competitive harm" test is particularly inappropriate because market conditions can change rapidly and unexpectedly—as this case itself demonstrates. When

the trial below was conducted in May 2016, online retailers could not participate in the SNAP program. Accordingly, the district court understood the relevant market to be limited to brick-and-mortar grocery and convenience stores. The district court thus focused its competitive-harm analysis on whether store-level SNAP data was likely to affect a grocer's decision whether "to open a new location" that would compete with an existing store. Pet. App. 19a-20a.

After trial, however, the Department of Agriculture announced a pilot program for online retailers to accept SNAP benefits. See Supplemental Nutrition Assistance Program (SNAP): Online Purchasing Pilot, http://bit.ly/2S4oZpS. That pilot program is expected to commence this year. See *ibid.* As the U.S. District Court for the Western District of Texas recognized in granting the Texas Retailers Association's request for a preliminary injunction against the release of store-level SNAP data for Texas retailers, the introduction of online retailers into the SNAP program could fundamentally alter the competitive-harm analysis under *National Parks*. See Order Granting Plaintiff's Motion for Preliminary Injunction 15-21, *Texas Retailers Ass'n* v. *USDA*, No. 1:18-cv-659 (W.D. Tex. Aug. 27, 2018) ("*TRA* Order").[19] Because online

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[19] On February 11, 2019, the Fifth Circuit vacated the Western District of Texas's preliminary injunction, instructing the Western District to "stay its hand from further activity until the Supreme Court's decision [in this case] is rendered." See *Texas Retailers Ass'n* v. *USDA*, No. 18-50895, 2019 WL 548966, at *1 (5th Cir. Feb. 11, 2019). Notably, the Fifth Circuit panel did not disagree with the Western District's conclusion that allowing online retailers to participate in SNAP could alter the competitive-harm analysis under *National Parks*. Instead, the vacatur appears to

retailers can target the customers of existing brick-and-mortar grocers without the expense of building new stores, it is easier and less costly for them to take advantage of store-level data. See *id.* at 15-16. New online retailers would also enjoy an asymmetrical competitive advantage: They could access the store-level SNAP data of their brick-and-mortar competitors, but traditional grocers could not currently obtain similar data regarding their new online competitors, because such data does not yet exist. See *id.* at 16; see also Pet. Br. 52.

"[N]either the district court nor the Eighth Circuit considered the potential for substantial competitive harm to traditional SNAP retailers should *online* SNAP retailers have access to the redemption data." *TRA* Order 20. The post-trial development of this new, highly material competitive factor illustrates why Exemption 4's application should not hinge on forecasts of competitive harm. Market conditions are dynamic, and information that today appears to have "no or little" relevance to business decisions (Pet. App. 19a) could quickly become highly significant with changes in technology or government regulations. But once sensitive business information is made public, the cat is out of the bag. Even if shifts in market conditions would warrant reclassifying disclosed information as "confidential" under *National Parks*, no practical mechanism exists for removing it from the public domain. Absent a direction from Congress in the statute's plain text, the Court should not read into

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have been motivated by concerns of jurisdiction and comity. *Id.* at *1 & n.1.

Exemption 4 a legal standard tied to the ever-changing winds of competition.

IV. *National Parks* Risks Deterring Companies From Sharing Information With The Government And Participating In Government Programs

By artificially narrowing the universe of information within Exemption 4's scope, *National Parks* discourages businesses from disclosing information to the government, participating in mutually beneficial government programs, and even seeking government benefits, out of fear that their sensitive information might fall into competitors' hands. The D.C. Circuit itself has recognized that a chilling effect exists with respect to information that private parties are not *required* to provide to the government. As that court has explained, "[i]t is a matter of common sense that the disclosure of information the Government has secured from voluntary sources on a confidential basis will * * * jeopardize its continuing ability to secure such data on a cooperative basis." *Critical Mass III*, 975 F.2d at 879. Thus, as explained above, see pp. 8-9, *supra*, the D.C. Circuit has limited the *National Parks* standard so that it applies only to "information submitted under compulsion." *Critical Mass III*, 975 F.2d at 879. Other courts, however, have yet to adopt that limitation on *National Parks*, so in those circuits the chilling effect on voluntary disclosures may persist.

Furthermore, *Critical Mass III* ignores that its concern about deterring the voluntary provision of information to the government extends to programs like SNAP where the government receives that

information only after a private party *voluntarily* chooses to participate in the program. It is just as much "a matter of common sense" that private parties may hesitate to participate in voluntary government programs if there is a significant risk that they may be required to furnish information subject to public release under FOIA. See 975 F.2d at 879. The same is true of government benefit programs, which condition receipt of a benefit on the provision of information.

These deterrent effects could have widespread consequences, because the cost of participating in many programs is furnishing the government a broad array of information. For example, the Environmental Protection Agency actively seeks the participation of businesses and other stakeholders in dozens of information-sharing programs, ranging from the "Combined Heat and Power Partnership," a "voluntary program seeking to reduce the environmental impact of power generation by promoting the use of environmentally beneficial combined heat and power," to the "AgSTAR Program," an effort to "[r]educe methane emissions at confined animal feedlot operations by promoting the use of biogas recovery systems." See Environmental Protection Agency, *List of Programs*, http://bit.ly/2MNUcYj.

Because so many agencies recognize the programmatic value of the information businesses and other stakeholders provide, other examples abound. See, *e.g.*, Occupational Safety and Health Administration, *Strategic Partnerships Overview*, https://bit.ly/2StDaE5 (describing the "OSHA Strategic Partnership Program Directive," in which "OSHA enters into an extended, voluntary,

cooperative relationship with groups of employers, employees and employee representatives"); Federal Aviation Administration, *Partnerships*, https://bit.ly/2RGIgZh (describing the "NextGen Advisory Committee," which is "led by senior airline executives and others in the aviation industry" and "helps the FAA set priorities and deliver tangible benefits"). And, because private commercial information is often used by the government to determine a benefit seeker's eligibility, there is also no shortage of benefits conditioned on the provision of such information. See *Sharyland*, 755 F.2d at 398 (corporation had filed audit reports with the Farmers Home Administration in order to obtain a loan); *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1134 (D.C. Cir. 1987) (company submitted "materials demonstrating its performance in hiring, promoting, and otherwise utilizing women and minorities" as "a condition of receiving federal contracts").

By adhering to the *National Parks* test, the lower courts have jeopardized programs that serve both public and private interests. Businesses have demonstrated that they will go to great lengths to avoid disclosing particularly sensitive information. See, *e.g.*, *Donovan*, 830 F.2d at 1134-1136 (describing company's sustained opposition to disclosure of sensitive information in litigation that the D.C. Circuit called a "five-year odyssey" and a "tortuous journey"). Therefore, it is likely that many businesses will decline to participate in otherwise mutually beneficial programs, and to seek the benefits for which they are eligible, if doing so would risk exposing sensitive commercial information under FOIA.

V. Exemption 4 Affects A Wide Range Of Industries And Types Of Information

The wide range of industries and types of information affected by Exemption 4 highlights the importance of applying that exemption in accordance with the plain meaning of the text that Congress enacted. The industries Exemption 4 affects range from the nation's most influential and pervasive—such as banking, see *Inner City Press*, 463 F.3d at 242 (addressing information in bank merger application submitted to Federal Reserve Board)—to those serving far more discrete interests, see, *e.g.*, *PETA*, 901 F.3d at 347-348 (affected parties were importers of nonhuman primates). Affected parties include nuclear power producers and nuclear waste disposal companies. See *Critical Mass I*, 830 F.2d at 279-280; *Utah*, 256 F.3d at 968-969. Some affected parties trade in lumber and others in agricultural products. See *Baker & Hostetler LLP* v. *Dep't of Commerce*, 473 F.3d 312, 315 (D.C. Cir. 2006); *Lion Raisins*, 354 F.3d at 1076. Their work often involves matters of great import, including public health and international relations. See *Public Citizen*, 704 F.2d at 1282-1284 (affected parties were manufacturers of vision-correcting intraocular lenses); *Stone* v. *Exp.-Imp. Bank of U.S.*, 552 F.2d 132, 133 (5th Cir. 1977) (affected party was an agency of the Soviet Union seeking U.S.-export financing). And many are non-businesses, such as labor unions and Indian tribes. See *American Airlines, Inc.* v. *Nat'l Mediation Bd.*, 588 F.2d 863, 864-865 (2d Cir. 1978); *Utah*, 256 F.3d at 968-969.

The diversity of affected parties reflects the extraordinary variety of disclosures required or requested by the federal government. The U.S. Code

requires private parties to furnish information to the government on such varied matters as securities,[20] banks,[21] labor,[22] food purity,[23] drug safety and efficacy,[24] and even "weather modification activity."[25] And, needless to say, the government may *request* information on a potentially infinite number of subjects, and use the tools at its disposal to ensure compliance.

It is no surprise, then, that the types of information litigated in Exemption 4 cases are just as diverse. The information sought ranges from documentation of agricultural inspections to "information on [automobile] airbag systems." See *Lion Raisins*, 354 F.3d at 1075; *Ctr. for Auto Safety* v. *NHTSA*, 244 F.3d 144, 145-147 (D.C. Cir. 2001). Exemption 4 cases frequently involve expansive information requests, such as the request to the Bureau of Labor Statistics in *FlightSafety Servs. Corp.* v. *Dep't of Labor*, 326 F.3d 607, 609 (5th Cir. 2003), for "all raw data collected to create" wage determination schedules for various markets. The information requests are also often intrusive, as when the Fifth Circuit declined to prevent the release of "audit reports" and "statements" documenting in detail a corporation's financial health. *Sharyland*, 755 F.2d at 398; see also *Continental Oil*, 519 F.2d at 35 (information at issue was "a contract by contract, field by field exposition of the petitioners'

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[20] See 15 U.S.C. § 77a, *et seq.*

[21] See 12 U.S.C. § 161.

[22] See 29 U.S.C. § 431.

[23] See 7 U.S.C. § 138e.

[24] See 21 U.S.C. § 355(i).

[25] See 15 U.S.C. § 330a.

product marketing"). Sometimes, the requested information risks harming the submitter's reputation. See *Donovan*, 830 F.2d at 1134-1136 (noting submitter's concern about "adverse publicity" if information regarding its affirmative-action programs was released).

Thus, it is imperative for the Court to clear up the considerable confusion *National Parks* has created. Refocusing courts on Exemption 4's plain text will alleviate uncertainty; reduce burdens on courts, litigants, and government agencies; and allow companies to make informed decisions about whether to voluntarily share sensitive information with the government or participate in government programs that may require disclosures.

CONCLUSION

For these reasons, and those in petitioner's brief, the judgment below should be reversed.

Respectfully submitted.

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